SINNAIYAH & SONS SDN BHD v. DAMAI SETIA SDN BHD

FEDERAL COURT, PUTRAJAYA
RICHARD MALANJUM CJ (SABAH & SARAWAK)
ABDULL HAMID EMBONG FCJ
HASAN LAH FCJ
ABU SAMAH NORDIN FCJ
RAMLY ALI FCJ
[CIVIL APPEAL NO: 02(f)-72-10-2013 (A)]
10 AUGUST 2015
[2015] CLJ JT(11)

CIVIL PROCEDURE: *Fraud – Standard of proof – Civil action – Claim for unpaid management fees and financial advances given under contract – Allegation of commission of fraud – Whether claim substantiated and proved – Standard of proof for fraud in civil claims – Whether on balance of probabilities – Whether ratio in Ang Hiok Seng v. Yim Yut Kiu should be relied on – Whether good law – Principles governing standard of proof for fraud in civil claims in Malaysia – Whether in line with common law principles – Whether should be reviewed*

EVIDENCE: *Standard of proof – Civil action – Fraud – Dispute arising from contract – Claim for unpaid management fees and financial advances given – Allegation that project manager fraudulently paid itself instead of paying subcontractor – Whether claim substantiated and proved – Standard of proof for fraud in civil claims – Whether on balance of probabilities – Evidence Act 1950, ss. 102 & 103*

The respondent ('the defendant') was awarded a contract to upgrade Federal Road A13 into a four-lane road ('the project'). The appellant ('the plaintiff') was appointed as the project manager, assigned to manage the accounts and to make payments to the sub-contractors. The defendant pre-signed all the cheques and authorised the plaintiff to make the necessary payments from a current bank account opened by the defendant. It was also agreed between the defendant and the plaintiff that the latter would be paid management fees for the services rendered for the duration of the project period. When the arrangement did not go as planned, the plaintiff sued the defendant for the sum of RM301,767.40 which it claimed to be the unpaid management fees and financial advances given. The defendant disputed the claim and counter-claimed for the sum of RM535,836.04, being an amount the defendant alleged the plaintiff had fraudulently paid itself instead of paying one of its sub-contractors. The High Court dismissed both the plaintiff's claim and the defendant's counter-claim on the grounds that the plaintiff had been duly paid for the management fees and that any financial advances made would be on illegal money-lending and that the defendant failed to prove its counterclaim. Both parties appealed to the Court of Appeal and the plaintiff's appeal was dismissed while the defendant's appeal was allowed. Hence, the present appeal by the plaintiff. The plaintiff submitted the arguments, *inter alia*, that (i) the correct standard of proof for fraud in civil claims should

be on the balance of probabilities; and (ii) the trial judge was not satisfied even on the balance of probabilities that the defendant had proved its counter-claim based on fraud. The primary issue that arose for the court's adjudication was whether the Federal Court should rely on the *ratio* set in *Ang Hiok Seng v. Yim Yut Kiu* ('*Ang*'s case') in determining the burden of proof in civil fraud.

Held (dismissing appeal with costs)
Per Richard Malanjum CJ (Sabah & Sarawak) delivering the judgment of the court:

(1) There is no specific provision in the Evidence Act 1950 or any legislation in Malaysia that stipulates the relevant standard of proof required in both criminal and civil proceedings. As such, the principles of law in relation to burden of proof and standard of proof are therefore common law principles. The present standard of proof for fraud in civil claim in Malaysia is not in line with the principles as applied in other common law jurisdictions and should therefore be reviewed. (paras 21 & 51)

(2) *Ang*'s case seemed to have made a distinction between civil fraud and criminal fraud even in civil proceedings. Examples of fraud with criminal nature in civil claims include conspiracy to defraud or misappropriation of money or criminal breach of trust, while fraud of civil nature were as provided under ss. 17 and 18 of the Contracts Act 1950. These sections define certain acts as 'fraud' and 'misrepresentation' if they have induced the entering of or deceived someone into entering a contract. Unfortunately, even with such illustration, the demarcation between civil and criminal fraud remained ambiguous. (para 31)

(3) Despite the re-affirmation of the law on the issue in *Yong Tim v. Hoo Kok Chong*, it is no longer the law in this country. Similarly, the principles in *Ang*'s case and *Lee You Sin v. Chong Ngo Khoon*, despite applying the civil standard to a certain extent, are also no longer the law. (para 53)

(4) The correct principle to apply is as explained in *In re B (Children)* where it was stipulated that at law, there are only two standard of proof, namely beyond reasonable doubt for criminal cases and on the balance of probabilities for civil cases. As such, even if fraud is the subject in a civil claim, the standard of proof is on the balance of probabilities. There is no third standard. Therefore, it is up to the presiding judge, after hearing and considering the evidence adduced as being done in any other civil claim, to find whether the standard of proof has been attained. The criminal aspect of the allegation of fraud and the standard of proof required is irrelevant in the deliberation. (paras 49 & 50)

(5) This judgment only applied to this appeal and to future cases and should not be utilised to set aside or review past decisions involving fraud in civil claims. (para 54)

Bahasa Malaysia *Translation Of Headnotes*

Responden ('defendan') telah diberikan satu kontrak untuk menaiktaraf Jalanraya Persekutuan A13 kepada jalanraya empat laluan ('projek tersebut'). Perayu ('plaintif') yang dilantik sebagai pengurus projek tersebut, dipertanggungjawabkan untuk menguruskan akaun dan menyempurnakan bayaran kepada semua subkontraktor. Defendan telah menandatangani kesemua cek dan memberikan kuasa kepada plaintif untuk membuat bayaran yang perlu daripada akaun semasa bank yang dibuka oleh defendan. Ia juga turut dipersetujui antara defendan dan plaintif bahawa plaintif akan dibayar yuran pengurusan bagi perkhidmatan yang diberikan semasa tempoh projek tersebut. Apabila perancangan tidak berjalan seperti yang dirancangkan, plaintif menyaman defendan bagi jumlah RM301,767.40 yang didakwa merupakan yuran pengurusan dan wang yang didahulukan yang belum dibayar. Defendan menafikan dakwaan dan menuntut balas bagi jumlah RM535,836.04 iaitu jumlah yang didakwa oleh defendan telah dibayar secara penipuan oleh plaintif kepadanya sendiri dan bukan kepada kesemua subkontraktornya. Mahkamah Tinggi menolak tuntutan plaintif dan tuntutan balas defendan atas alasan bahawa plaintif telah dibayar bagi yuran pengurusan dan bahawa kesemua wang yang didahulukan merupakan pinjaman wang secara haram dan bahawa defendan gagal membuktikan tuntutan balasnya. Kedua-dua pihak merayu kepada Mahkamah Rayuan dan rayuan plaintif ditolak manakala rayuan defendan dibenarkan. Oleh itu, rayuan ini oleh plaintif. Plaintif menghujahkan, antara lain, bahawa (i) standard pembuktian bagi penipuan dalam tuntutan sivil mestilah atas imbangan kebarangkalian; dan (ii) hakim bicara juga tidak berpuas hati atas imbangan kebarangkalian bahawa defendan telah membuktikan tuntutan balasnya berdasarkan penipuan. Isu utama yang timbul bagi pemutusan mahkamah adalah sama ada Mahkamah Persekutuan wajar bersandarkan pada *ratio* yang ditetapkan dalam kes *Ang Hiok Seng v. Yim Yut Kiu* ('kes *Ang*') untuk menentukan beban pembuktian dalam penipuan sivil.

Diputuskan (menolak rayuan dengan kos)
Oleh Richard Malanjum HB (Sabah & Sarawak) menyampaikan penghakiman mahkamah:

(1) Tiada peruntukan khusus dalam Akta Keterangan 1950 atau mana-mana perundangan di Malaysia yang menyatakan standard pembuktian relevan yang diperlukan dalam kedua-dua prosiding jenayah dan sivil. Oleh itu, prinsip undang-undang berkaitan beban dan standard pembuktian adalah berdasarkan prinsip-prinsip common law. Standard pembuktian bagi tuntutan sivil di Malaysia kini tidak selari dengan prinsip-prinsip yang dipakai dalam bidang kuasa common law dan dengan itu, sepatutnya disemak semula.

(2) Kes *Ang* seolah-olah membuat pembezaan antara penipuan sivil dengan penipuan jenayah dalam prosiding sivil. Contoh-contoh penipuan bersifat jenayah dalam tuntutan sivil termasuklah konspirasi untuk

menipu atau penyelewengan wang atau jenayah pecah amanah manakala penipuan bersifat sivil pula diperuntukkan di bawah ss. 17 dan 18 Akta Kontrak 1950. Seksyen-seksyen ini mentakrifkan sesetengah tindakan sebagai 'penipuan' dan 'salahnyataan' sekiranya kesemuanya mendorong kepada kemasukan atau menipu seseorang untuk memasuki satu-satu kontrak. Malangnya, walaupun dengan ilustrasi sedemikian, garis pemisah antara penipuan sivil dengan penipuan jenayah kekal taksa.

(3) Meskipun terdapat penegasan tentang isu ini dalam *Yong Tim v. Hoo Kok Chong*, ia bukan lagi undang-undang dalam negara ini. Begitu juga, prinsip dalam kes *Ang* dan *Lee You Sin v. Chong Ngo Khoon*, walaupun mengguna pakai standard sivil hingga ke suatu tahap, juga tidak menjadi lagi undang-undang.

(4) Prinsip yang betul untuk diguna pakai adalah seperti yang dijelaskan dalam *In re B (Children)* di mana dinyatakan bahawa di bawah undang-undang, hanya terdapat dua standard pembuktian, iaitu melampaui keraguan munasabah bagi kes-kes jenayah dan atas imbangan kebarangkalian bagi kes-kes sivil. Dengan itu, jika pun penipuan merupakan subjek dalam tuntutan sivil, standard pembuktian adalah atas imbangan kebarangkalian. Tiada standard ketiga. Oleh itu, adalah bergantung kepada hakim yang mempengerusikan, selepas mendengar dan mempertimbangkan bukti yang dikemukakan, seperti yang dilakukan dalam tuntutan sivil yang lain, untuk memutuskan sama ada standard pembuktian telah dicapai. Aspek jenayah dalam dakwaan penipuan dan standard pembuktian yang diperlukan tidak relevan dalam perbincangan.

(5) Penghakiman ini hanya terpakai kepada rayuan ini dan kes-kes di masa hadapan dan tidak seharusnya diguna pakai untuk mengenepikan atau menyemak semula keputusan-keputusan terdahulu yang melibatkan penipuan dalam tuntutan sivil.

Case(s) referred to:

Ang Hiok Seng v. Yim Yut Kiu [1997] 1 CLJ 497 FC ***(ovrd)***
Asean Security Paper Mills Sdn Bhd v. CGU Insurance Bhd [2007] 2 CLJ 1 FC ***(refd)***
Bater v. Bater [1951] P 35 ***(refd)***
Boonsom Boonyanit v. Adorna Properties Sdn Bhd [1997] 3 CLJ 17 CA ***(refd)***
Chong Song v. Uma Devi V Kandiah [2011] 3 CLJ 1 CA ***(refd)***
Chu Choon Moi v. Ngan Sew Tin [1985] 1 LNS 134 FC ***(refd)***
Chua Kwee Chen v. Koh Choon Chin [2006] 3 SLR 469 ***(refd)***
Datuk Jagindar Singh & Ors v. Tara Rajaratnam [1985] 1 LNS 157 PC ***(refd)***
Doe d Devine v. Wilson [1855] 14 ER 851 ***(refd)***
Eastern Enterprises v. Ong Choo Kim [1969] 1 LNS 35 HC ***(refd)***
Eric Chan Thiam Soon v . Sarawak Securities Sdn Bhd [2000] 4 CLJ 464 HC ***(refd)***
FH v. McDougall [2008] SCC 53 ***(refd)***
Hanes v. Wawanesa Mutual Insurance Co [1963] 36 DLR (2d) ***(refd)***
Helton v. Allen [1940] 63 CLR 691 ***(refd)***
Hornal v. Neuberger Products Ltd [1957] 1 QB 247 ***(refd)***

In re B (Children) (Care Proceedings: Standard of Proof) (CAFCASS intervening [2008] UKHL 35 ***(foll)***
In re S-B Children [2009] UKSC 17 ***(refd)***
Lau Kee Ko & Anor v. Paw Ngi Siu [1973] 1 LNS 71 FC ***(ovrd)***
Lee You Sin v. Chong Ngo Khoon [1981] 1 LNS 116 FC ***(ovrd)***
Miller v. Minister of Pensions [1947] 2 All ER 372 ***(refd)***
Narayanan Chettiar v. Official Assignee of the High Court, Rangoon AIR 1941 PC 93 ***(refd)***
New York v. Heirs of Phillips Decd [1939] 3 All ER 952 ***(refd)***
PP v. Yuvaraj [1970] 2 WLR 226 ***(refd)***
R (McCann) v. Crown Court at Manchester [2003] 1 AC 787 ***(refd)***
Ratna Ammal v. Tan Chow Soo [1967] 1 LNS 137 FC ***(refd)***
Re H (Minors) (Sexual Abuse: Standard of Proof) [1996] AC 563 ***(refd)***
Rejfek v. McElroy [1965] 39 ALJR 177 ***(refd)***
Saminathan v. Pappa [1980] 1 LNS 174 PC ***(refd)***
Secretary of State for the Home Department v. Rehman [2001] UKHL 47; [2003] 1 AC 153 ***(refd)***
Shell Malaysia Trading Sdn Bhd v. Tan Bee Leh @ Tan Yue Khoen & Ors [2012] 1 LNS 1071 HC ***(refd)***
Tang Yoke Kheng v. Lek Benedict [2005] 3 SLR 263 ***(refd)***
Yogambikai Nagarajah v. Indian Overseas Bank [1996] 2 SLR (R) 774 ***(refd)***
Yong Tim v. Hoo Kok Chong & Anor [2005] 3 CLJ 229 FC ***(ovrd)***

Legislation referred to:
Contracts Act 1950, ss. 17, 18
Evidence Act 1950, ss. 3, 102, 103

For the appellant - Malik Imtiaz (Ananthan Ragawan, Chan Wei June & Gurbachan Singh with him); M/s Ananth & Assocs
For the respondent - Gopal Sri Ram (Yunus Ali & Norazali Nordin with him); M/s Yunus Ali & Kam

[Appeal from Court of Appeal; Civil Appeal No: A-02-(NVCV)(W)-1114-05-2012]

Reported by Najib Tamby

JUDGMENT

Richard Malanjum CJ (Sabah & Sarawak):

Introduction

[1] This court granted the appellant leave to appeal on 10 October 2013.

[2] There is only one leave question to consider which reads:

> Whether the Federal Court should rely on the *ratio* set in *Ang Hiok Seng @ Ang Yeok Seng v. Yim Yut Kiu (Personal representative of the estate of Chan Weng Sun, deceased)* [1997] 2 MLJ 45 in determining the burden of proof in civil fraud?'

[3] At the outset we note that the leave question uses the term "burden of proof in civil fraud".

[4] There is of course a difference between the terms "burden of proof" and "standard of proof".

[5] Briefly the former relates to the burden or obligation of proving a fact on the party who exerts the existence of any fact in issue and wishes the court to believe in its existence – ss. 102 and 103 of the Evidence Act 1950 ('the Act'). The burden of proof of a party never shifts.

[6] The latter refers to "the degree of persuasion which the tribunal must feel before it decides that the fact in issue did happen". (*In re B (Children) (Care Proceedings: Standard of Proof) (CAFCASS intervening* (2008) UKHL 35 - Per Lord Hoffmann para. 4).

[7] With respect, after hearing the submissions of learned counsel for the parties we are of the view that the real issue for determination is on the standard of proof required in civil claim when fraud is alleged. Accordingly we will take that the use of the term "burden of proof" in the leave question is meant to be the "standard of proof".

[8] Now, before we dwell into the leave question, we need to first consider the facts involved in this appeal. This is necessary so that irrespective of our answer to the leave question, we would at the same time be able to determine the final outcome of this appeal.

[9] Further, in this judgment the appellant will be referred to as the plaintiff and the respondent as the defendant unless the context otherwise requires.

Background Facts

[10] In early 2005, the defendant, Damai Setia Sdn Bhd was awarded a contract by Public Works Department ('PWD') to upgrade Federal Road A13 into a four-lane road from Jalan Sultan Azlan Shah Junction to Tanjung Rambutan in the State of Perak ('the project'). On 1 February 2005 the defendant appointed a company VN Sunrise ('Sunrise') as their sub-contractor for the project. Work on the project commenced on 1 February 2005. It was duly completed on 15 October 2005. There was a two months delay in the completion. Concurrently the defendant appointed the plaintiff, Sinnaiyah & Sons Sdn Bhd as the project manager for the project. As the project manager, the plaintiff was to manage the accounts for the project and to make payments to subcontractors for the project including Sunrise for goods and materials supplied.

[11] In order to receive payments from PWD for the project and to facilitate the arrangement with the plaintiff, the defendant opened a current bank account with Bank Bumiputera Commerce in Johor Bahru. The defendant pre-signed all cheques and authorised the plaintiff to make the necessary payments from time to time from the said bank account. It was also agreed between the defendant and the plaintiff that the latter would be paid management fees for the services rendered for the duration of the project period (ie, 1 February 2005 until 15 October 2005).

[12] Unfortunately, the arrangement between the defendant and the plaintiff did not go smoothly. Dispute arose. The plaintiff sued the defendant for the sum of RM301,767.40 which it claimed to be the unpaid management fees and financial advances given.

[13] In turn, the defendant not only disputed the claim but also counterclaimed for the sum of RM535,836.04, being an amount the defendant alleged the plaintiff to have fraudulently paid itself instead of paying Sunrise.

[14] In defence to the counterclaim, the plaintiff asserted that the sums it paid itself was for set-offs or contra payments for goods and materials supplied to Sunrise for the completion of the project.

Before The High Court

[15] After hearing the evidence, the learned trial judge dismissed both claim of the plaintiff and the counterclaim of the defendant. It was the finding of the learned trial judge that the plaintiff had been duly paid for the management fees, that any financial advances made would be on illegal money lending and that the defendant failed to prove its counterclaim.

Before The Court of Appeal

[16] Dissatisfied with the decision of the High Court both parties appealed to the Court of Appeal. In coming to its decision, the Court of Appeal dismissed the appeal by the plaintiff. The Court of Appeal held that the plaintiff had failed to prove its claim for financial advances to the defendant. The defendant did not sign the payment vouchers for the alleged financial advances and with the project almost completed there was also no necessity for the alleged financial advances. As to the claim for management fees, the Court of Appeal held that it was in fact a claim for interests. The project was already completed. Management fees were no longer required.

[17] In respect of the counterclaim of the defendant, the Court of Appeal held that the finding of the High Court was against the weight of the evidence adduced. The plaintiff was not authorised to pay itself but to Sunrise. The set-offs and contra payments as alleged by the plaintiff were unfounded as the defendant was still indebted to Sunrise. The appeal of the defendant was therefore allowed.

Before This Court

Submissions Of Parties

[18] Briefly, learned counsel for the plaintiff submitted:

(i) that the correct standard of proof for fraud in civil claims should be on the balance of probabilities;

(ii) that the learned trial judge was not satisfied even on the balance of probabilities that the defendant had proved its counterclaim based on fraud; and

(iii) that the Court of Appeal therefore erred in finding that the diversion of the fund by the plaintiff was unauthorised. The defendant was aware of the diversion and explanation given but was not considered by the Court of Appeal.

[19] In response, learned counsel for the defendant argued:

(i) that the present standard of proof for fraud in civil claims in Malaysia is not in tandem with the standard applied in other common law jurisdictions;

(ii) that the present standard adopted for fraud in civil claims in Malaysia is not premised on policy ground. It is a product of misinterpretation of the judgment of Lord Atkin in *Narayanan Chettiar v. Official Assignee of the High Court, Rangoon* (28) AIR 1941 Privy Council 93;

(iii) that the principle propounded by this court in *Ang Hiok Seng v. Yim Yut Kiu* [1997] 1 CLJ 497; [1997] 2 MLJ 45 is impossible to apply;

(iv) that the standard of proof for fraud in civil claims should be on the balance of probabilities. However, where the allegation of fraud is serious in nature as for instance criminal in nature, a higher quality of evidence should be demanded while maintaining the standard of proof to be on the balance of probabilities;

(v) that in this case neither the learned trial judge nor the Court of Appeal applied the proper standard. Nevertheless they must be assumed to have applied the correct test;

(vi) that in this case irrespective of which standard of proof to apply, the plaintiff should be liable for the counterclaim of the defendant. There was a misappropriation of trust by the plaintiff when it diverted the use of the pre-signed cheques to pay itself. Further, if indeed the diversion of the fund was pursuant to an arrangement made between the plaintiff and Sunrise, there should be no longer any demand made by Sunrise to the defendant. Yet there were six demand letters served on the defendant; and

(vii) that the learned trial judge failed to properly consider the documentary evidence while preferring the oral evidence adduced. As such the Court of Appeal was right to review and reassess the evidence adduced and coming to its own factual finding.

Decision Of This Court

[20] We begin with our observation that there is no specific provision in the Act or for that matter any legislation in Malaysia that stipulates the relevant standard of proof required in both criminal and civil proceedings. Section 3 of the Act in interpreting the words 'proved' and 'disproved' only makes reference to a 'prudent man'. As such the principles of law in relation

to burden of proof and standard of proof are therefore common law principles. (See: *Public Prosecutor v. Yuvaraj* (1970) 2 WLR 226; *Bater v. Bater* (1951) P 35; *Miller v. Minister of Pensions* (1947) 2 All ER 372).

[21] On casual perusal of the reported judgments by the courts in this country it can be elicited that there are at least three principles propounded in addressing the issue of what is the standard of proof required in civil claims when fraud is the subject matter.

[22] The first principle is premised on the standard of beyond reasonable doubt as applied in criminal cases. Such principle began in the case of *Saminathan v. Pappa* [1980] 1 LNS 174; [1981] 1 MLJ 121 in which the Privy Council upheld the decision of the then Federal Court that adopted the principle enunciated in *Narayanan (supra)*. Lord Atkin in that case said this at p. 95:

> There are other difficulties in the plaintiffs' way which have been sufficiently considered in the judgments of the High Court. Fraud of this nature, like any other charge of a criminal offence, whether made in civil or criminal proceedings, must be established beyond reasonable doubt. The High court were justified in holding that the trial judge's finding was largely based on suspicion and conjecture.

[23] After *Saminathan (supra)* most of the subsequent decisions by the courts in Malaysia followed this first principle. (See: *Chu Choon Moi v. Ngan Sew Tin* [1985] 1 LNS 134; [1986] 1 MLJ 34 and *Datuk Jagindar Singh & Ors v. Tara Rajaratnam* [1985] 1 LNS 157; [1986] 1 MLJ 105).

[24] But it would be quite erroneous to say that prior to *Saminathan (supra)* the courts in this country had also applied the first principle as enunciated. On the contrary before *Saminathan (supra)* the courts in this country applied *albeit* "a very high degree of" the balance of probability standard in civil claims when fraud was alleged. In the case of *Lau Kee Ko & Anor v. Paw Ngi Siu* [1973] 1 LNS 71; [1974] 1 MLJ 21, Raja Azlan Shah J (as His Majesty then was) delivering judgment for the then Federal Court said this at p. 23:

> It is a wholesome rule of our law that where a plaintiff alleges fraud, he must do more than establish the allegation on the basis of probabilities. While the degree of certainty applicable to a criminal case is not required, there must, in order to succeed, be a very high degree of probability in the allegation.

(See also the earlier case of *Ratna Ammal v. Tan Chow Soo* [1967] 1 LNS 137; [1967] 1 MLJ 296).

[25] Meanwhile we take note that this court in *Ang Hiok Seng (supra)* declared that "to the extent that the general statement of the law in *Lau Kee Ko (supra)* is understood to mean a total rejection of the criminal burden in all cases of fraud, it is no longer good law". Whether this pronouncement is tenable today depends on our answer to the leave question.

[26] Anyway, even after *Saminathan (supra)* the then Federal Court appeared to have reverted to the earlier position. In the case of *Lee You Sin v. Chong Ngo Khoon* [1981] 1 LNS 116; [1982] 2 MLJ 15, the civil standard of proof for civil claims, that is, on the balance of probabilities was adopted despite the allegation of fraud. However, the court imposed the requirement of a higher degree of probability for a serious allegation of fraud. We take it as the second principle.

[27] In delivering the judgment of the court Lee Hun Hoe CJ (Borneo) after making reference to *Bater v. Bater (supra)* said this at p. 17:

> We would therefore with respect suggest the test to be applied is one set out in *Bater v Bater* [1950] 2 All ER 458, i.e. the learned judge was correct in relying on *Bater v. Bater* though his mistake was in not saying that the statement of claim in substance alleges fraud.

[28] The foregoing view expressed in *Lee You Sin (supra)* was in tandem with what Winslow J said in the Singapore case of *Eastern Enterprises Ltd v. Ong Choo Kim* [1969] 1 LNS 35; [1969] 1 MLJ 236. He said this at p. 242:

> I would therefore conclude for purposes of this action that the plaintiffs must establish their allegation against the defendant on a balance of probability as laid down by *Doe d. Devine v. Wilson* subject to the qualification that in tilting the balance against the defendant, they must attain a higher degree of probability than is required in an ordinary case of civil negligence though not the very high standard of the criminal law. Although the difference in the standards of proof in civil and criminal cases "may well turn out to be more a matter of words than anything else" (per Denning L.J. in *Bater*'s case), the Australian High Court in the *Rejfek* case held that it was no mere matter of words but a matter of critical substance.

[29] In other words, both the cases of *Eastern Enterprises (supra)* and *Lee You Sin (supra)* applied the balance of probabilities standard when fraud was alleged subject to the requirement of a higher degree of probability depending on the seriousness of the allegation. The more serious it is such as tilting towards criminal liability the higher degree of probability is required before it can be said that the standard of proof on the balance of probabilities has been satisfied.[1]

[30] But while the two earlier conflicting principles[2] adopted by the highest court of this country were yet to be reconciled, this court in the case of *Ang Hiok Seng v. Yim Yut Kiu (supra)* crafted the third principle. It was held that the standard of proving fraud should be dependent on the nature of the fraud alleged. In delivering the judgment for the court Mohd Azmi FCJ said this at pp. 59 - 60:

> ... where the allegation of fraud in civil proceedings concerns criminal fraud such as conspiracy to defraud or misappropriation of money or criminal breach of trust, it is settled law that the burden of proof is the criminal standard of proof beyond reasonable doubt, and not on the balance of probabilities.

...

... But where the allegation of fraud (as in the present case) is entirely founded on a civil fraud — and not based on a criminal conduct or offence — the civil burden is applicable.

[31] We would say that the *Ang*'s case *(supra)* seemed to have made a distinction between civil fraud and criminal fraud even in civil proceedings. Examples of fraud with criminal nature in civil claims were given such as conspiracy to defraud or misappropriation of money or criminal breach of trust while for fraud of civil nature were those provided under ss. 17 and 18 of the Contracts Act 1950. Those sections define certain acts as 'fraud' and 'misrepresentation' if they have induced the entering or deceived someone into entering a contract. Unfortunately even with such illustrations the demarcation between civil and criminal fraud remained ambiguous.[3]

[32] The confusion was further compounded when this court quite recently in the case of *Yong Tim v. Hoo Kok Chong & Anor* [2005] 3 CLJ 229 was emphatic and adopted the first principle, namely, that "the standard of proof for fraud in civil proceedings is one of beyond reasonable doubt which has been consistently applied by the courts in Malaysia. We see no reason to disturb that trend". (See also: *Asean Security Paper Mills Sdn Bhd v. CGU Insurance Bhd* [2007] 2 CLJ 1).

[33] It is therefore not surprising that subsequent to *Yong Tim (supra)* the lower courts, being bound by the principle of *stare decisis*, adopted the criminal standard of proof for fraud in civil claims. (See: *Chong Song v. Uma Devi V Kandiah* [2011] 3 CLJ 1; [2011] 2 MLJ 585; *Shell Malaysia Trading Sdn Bhd v. Tan Bee Leh @ Tan Yue Khoen & Ors* [2012] 1 LNS 1071; [2013] 8 MLJ 533.

[34] In view of such uncertainty in the law, both learned counsel for the parties in this appeal strenuously urged us to revisit the earlier decisions of the courts in this country. It was submitted that the position of the law should be rectified so as to be in tandem with the generally accepted standard as applied in other common law jurisdictions, in particular among the Commonwealth countries such as England, Canada, Australia and Singapore.

[35] Now, before we respond to that urging it is only appropriate that we begin by examining the English position. Based on the various decisions of the English courts it is clear that under English law the standard of proof for fraud in civil claim has been on the balance of probabilities. But "the elements of gravity of an issue are part of the range of circumstances which have to be weighed when deciding as to the balance of probabilities".[4]

[36] While the English position appeared to be clear, some confusion came about when the Privy Council through Lord Atkin held otherwise[5] and failed to consider an earlier decision of the same tribunal.[6] This resulted in some common law jurisdictions including this country adopting the criminal

standard of proof on a beyond reasonable doubt in civil claims when fraud is alleged. But there were also some other jurisdictions, after considering the rationale of the proposition by Lord Atkin, declined to follow it.[7]

[37] Be that as it may, the English position is now settled once and for all in the case of *In re B (Children) (supra)*.[8] In that case the House of Lords held that there is "only one civil standard of proof and that is proof that the fact in issue more probably occurred than not". The "range of circumstances which have to be weighed when deciding as to the balance of probabilities"[9] or "heightened civil standard"[10] is no longer a factor to consider "when deciding as to the balance of probabilities". This is what Lord Hoffmann said at p. 7:

> My Lords, I would invite your Lordships fully to approve these observations. I think that the time has come to say, once and for all, that here is only one civil standard of proof and that is proof that the fact in issue more probably occurred than not. I do not intend to disapprove any of the cases in what I have called the first category, but I agree with the observation of Lord Steyn in *McCann*'s case, at p 812, that clarity would be greatly enhanced if the courts said simply that although the proceedings were civil, the nature of the particular issue involved made it appropriate to apply the criminal standard.

[38] And Baroness Hale of Richmond was even more forceful in emphasising on the law when she said this at p. 11 and p. 22 respectively:

> In our legal system, if a judge finds it more likely than not that something did take place, then it is treated as having taken place. If he finds it more likely than not that it did not take place, then it is treated as not having taken place. He is not allowed to sit on the fence. He has to find for one side or the other. Sometimes the burden of proof will come to his rescue: the party with the burden of showing that something took place will not have satisfied him that it did. But generally speaking a judge is able to make up his mind where the truth lies without needing to rely upon the burden of proof.
>
> ...
>
> My Lords, for that reason I would go further and announce loud and clear that the standard of proof in finding the facts necessary to establish the threshold under section 31(2) or the welfare considerations in section 1 of the 1989 Act is the simple balance of probabilities, neither more nor less. Neither the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts. The inherent probabilities are simply something to be taken into account, where relevant, in deciding where the truth lies.

[39] It is worthy to note that the English Supreme Court in the case of *In re S-B Children* (2009) UKSC 17 followed the law as pronounced in *In re B (Children) (supra)*. The Supreme Court firmly approved that "there is only one civil standard of proof and that is proof that the fact in issue more

probably occurred than not". The court also rejected the "nostrum, 'the more serious the allegation, the more cogent the evidence needed to prove it'". This rejection goes to show that even for hybrid cases[11] the same civil standard of proof applies.

[40] The Canadian courts took the same position as the English courts. In *FH v. McDougall* [2008] SCC 53 the Canadian Supreme Court held that "in civil cases there is only one standard of proof and that is proof on a balance of probabilities. In all civil cases, the trial judge must scrutinise the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred".

[41] And in rejecting the suggestion that there are different levels of scrutiny of evidence depending on the seriousness of the allegation, Rothstein J delivering the judgment of the Canadian Supreme Court said this at para. 45:

> To suggest that depending upon the seriousness, the evidence in the civil case must be scrutinised with greater care implies that in less serious cases the evidence need not be scrutinised with such care. I think it is inappropriate to say that there are legally recognised different levels of scrutiny of the evidence depending upon the seriousness of the case. There is only one legal rule and that is that in all cases, evidence must be scrutinised with care by the trial judge.

[42] In fact long before *McDougall (supra)* the position of the law in Canada[12] was in line with the jurisprudence as stated in *Bater v. Bater (supra)*.

[43] In Australia the approach then by the courts there could be surmised in the case of *Rejfek v. McElroy* (1965) 39 ALJR 177 in which the High Court of Australia stated this at para. 11:

> But the standard of proof to be applied in a case and the relationship between the degree of persuasion of the mind according to the balance of probabilities and the gravity or otherwise of the fact of whose existence the mind is to be persuaded are not to be confused. The difference between the criminal standard of proof and the civil standard of proof is no mere matter of words: it is a matter of critical substance. No matter how grave the fact which is to be found in a civil case, the mind has only to be reasonably satisfied and has not with respect to any matter in issue in such a proceeding to attain that degree of certainty which is indispensable to the support of a conviction upon a criminal charge.

[44] It is to be noted that *Rejfek v. McElroy (supra)* followed an earlier decision of the High Court in *Helton v. Allen* (1940) 63 CLR 691 that preferred the decision in *Doe d Devine v. Wilson (supra)* to that of Lord Atkin's pronouncements in *New York v. Heirs of Phillips Dec'd (supra)* and *Narayanan (supra)*. Indeed the pronouncements of Lord Atkin were considered as a mere *dicta*.

[45] Nearer home, in Singapore, the principle of law on the standard of proof for fraud in civil claims is also on the balance of probabilities. And although the notion of a third standard of proof where fraud is the subject in a civil claim has been rejected, the courts there nevertheless added a caution that "the more serious the allegation, the more the party, on whose shoulders the burden of proof falls, may have to do if he hopes to establish his case".[13]

[46] It is therefore quite obvious that the current law in Singapore on the standard of proof for fraud in civil claims is the pre *In re B (Children) (supra)* position under the English law.

[47] In view of the positions of the law in the respective common law jurisdictions as summarised above, we agree with both learned counsel for the parties in this appeal that the position of the law on the standard of proof for fraud in civil claims in this country is far from satisfactory. With respect, there is merit in the submission of learned counsel for the defendant that the adoption of the criminal standard of proof for fraud in civil claims is due to the misinterpretation or even a blind adoption of the judgment of Lord Atkin in *Narayanan Chettiar v. Official Assignee of the High Court, Rangoon (supra)*.

[48] As such, in our judgment the time has come to realign the position of the law in this country on the standard of proof for fraud in civil claims. While learned counsel for the defendant seemed to favour the adoption of the Singapore position, learned counsel for the plaintiff urged us to adopt the principle in *In re B (Children) (supra)*.

[49] With respect, we are inclined to agree with learned counsel for the plaintiff that the correct principle to apply is as explained in *In re B (Children) (supra)*. It is this: that at law there are only two standards of proof, namely, beyond reasonable doubt for criminal cases while it is on the balance of probabilities for civil cases. As such even if fraud is the subject in a civil claim the standard of proof is on the balance of probabilities. There is no third standard. And "(N)either the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts".

[50] Hence, it is therefore up to the presiding judge, after hearing and considering the evidence adduced as being done in any other civil claim to find whether the standard of proof has been attained. "The inherent probabilities are simply something to be taken into account, where relevant, in deciding where the truth lies". The criminal aspect of the allegation of fraud and the standard of proof required thereof should be irrelevant in the deliberation.

[51] Accordingly as stated earlier we agree with the reasons given by learned counsel for both parties that the present standard of proof for fraud in a civil claim in this country is not in line with the principle as applied in other common law jurisdictions and should therefore be reviewed.[14] Indeed

it is quite obvious in *Narayanan (supra)* that Lord Atkin did not provide any cogent reason for applying the criminal standard of proof in a civil claim when fraud is alleged. Similarly in *Saminathan (supra)* the principle in *Narayanan (supra)* was applied without any discussion on its rationale.

[52] We therefore reiterate that we agree and accept the rationale in *In re B (Children) (supra)* that in a civil claim even when fraud is alleged the civil standard of proof, that is, on the balance of probabilities, should apply. And perhaps it is not out of place here to restate the general rule at common law that, "in the absence of a statutory provision to the contrary, proof in civil proceedings of facts amounting to the commission of a crime need only be on a balance of probabilities". (See *Boonsom Boonyanit v. Adorna Properties Sdn Bhd* [1997] 3 CLJ 17, at p. 32; [1997] 2 MLJ 62, at p. 74).

[53] Accordingly, despite the reaffirmation of the law on the issue in *Yong Tim v. Hoo Kok Chong (supra)* we hold that it is no longer the law in this country. Similarly, the principles as pronounced in *Ang Hiok Seng (supra)* and *Lee You Sin v. Chong Ngo Khoon (supra)* despite applying the civil standard to a certain extent are also no longer the law. Hence, the disapproval of *Lau Kee Ko (supra)* in *Ang Hiok Seng (supra)* is no longer relevant.

[54] However, we should make it clear that this judgment only applies to this appeal and to future cases and should not be utilised to set aside or review past decisions involving fraud in civil claims.

[55] Our answer to the leave question is therefore in the negative.

[56] Reverting to the present appeal, we have duly perused the facts and evidence adduced. And applying the principle we have just pronounced on the standard of proof for fraud in civil claims which is less onerous than the standard applied by the courts below, we agree with the reasons, findings and conclusions of the Court of Appeal in allowing the counterclaim of the defendant.

[57] In the upshot this appeal is therefore dismissed with costs.

Endnotes:

1. See: *Hornal v. Neuberger Products Ltd* [1957] 1 QB 247
2. Re: *Saminathan (supra)* and *Lee You Sin (supra)*
3. Note on the view expressed on the difficulties in distinguishing between civil and criminal fraud in *Eric Chan Thiam Soon v. Sarawak Securities Sdn Bhd* [2000] 4 CLJ 464; [2000] 4 AMR 3784
4. See: *Bater v. Bater (supra)*; *Hornal v. Neuberger Products Ltd (supra)* – '… for in all cases the degree of probability must be commensurate with the occasion and proportionate to the subject-matter. The elements of gravity of an issue are part of the range of circumstances which have to be weighed when deciding as to the balance of probabilities.'

A

5. See: *New York v. Heirs of Phillips Decd* [1939] 3 All ER 952; *Narayanan (supra).*

6. See: *Doe d Devine v. Wilson* (1855) 14 ER 851 – 'In a civil case ... The jury must weigh the conflicting evidence, consider all the probabilities of the case, not excluding the ordinary presumption of innocence, and must determine the question according to the balance of those probabilities'.

B

7. Canada and Australia courts declined to follow Lord Atkin's preposition.

C

8. See Note 1 above; See also *Secretary of State for the Home Department v. Rehman* [2001] UKHL 47; [2003] 1 AC 153 where Lord Hoffmann first stated the law.

9. *Hornal v. Neuberger Products Ltd (supra)*

D

10. See: *R (McCann) v. Crown Court at Manchester* (2003) 1 AC 787 per Lord Steyn

11. Civil cases but containing material allegations implying criminal conduct. There are some judicial views that for a hybrid case a higher degree of probability or a higher standard of proof is required. In the words of Lady Hale in *re S-B Children (supra)* such views 'had become a commonplace but was a misinterpretation of what Lord Nicholls had in fact said' *In Re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563.

E

12. See: *Hanes v. Wawanesa Mutual Insurance Co* (1963) 36 DLR (2d)

F

13. *Tang Yoke Kheng v. Lek Benedict* (2005) 3 SLR 263; *Yogambikai Nagarajah v. Indian Overseas Bank* (1996) 2 SLR (R) 774

14. See: *Chua Kwee Chen v. Koh Choon Chin* [2006] 3 SLR 469 which discusses the thorny issues related to the application of the criminal standard in a civil claim involving the allegation of fraud.

G

H

I